No. ___

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Can Petitioners state a claim for a taking under the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution when state law defines standing timber as a separate and independent property interest and when the refusal of the United States Fish & Wildlife Service to issue an incidental take permit for a spotted owl nesting site denied Petitioners all economically beneficial or productive use of such timber and eviscerated their reasonable investment-backed expectations?

(2) Can Petitioners state a claim for a physical taking of their property in violation of the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution when, in order to protect a spotted owl nesting site, the United States Fish & Wildlife Service denied Petitioners the right to exclude the owls by refusing to issue an incidental take permit that would have authorized Petitioners to log their 40-acre tract of land?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are Petitioners Marsha and Alvin Seiber and Respondent United States.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Marsha and Alvin Seiber respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit affirming the Court of Federal Claims' dismissal with prejudice of Petitioners' takings claims based upon the Fifth Amendment to the U.S. Constitution.

OPINIONS BELOW

The appellate judgment, entered on April 19, 2004, is reproduced as Appendix A ("App. A"). The April 19, 2004 decision of the United States Court of Appeals for the Federal Circuit is reproduced as Appendix B ("App. B"). The September 6, 2002 judgment of the Court of Federal Claims dismissing plaintiffs' claims with prejudice is reproduced as Appendix C ("App. C"). The Court of Federal Claims'

September 4, 2002 opinion dismissing Petitioners' physical and regulatory takings claims is reproduced as Appendix D ("App. D").

STATEMENT OF JURISDICTION

The appellate judgment and opinion of the United States Court of Appeals for the Federal Circuit was entered on April 19, 2004 (*see* Apps. A and B). (*See* App. A.) This Petition is being timely filed within 90 days of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision at issue in this case is the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The U.S. Fish & Wildlife Service (the "FWS") is authorized to issue an incidental take permit ("ITP") for the "taking" of a threatened species under section 10 of the Endangered Species Act of 1973 (the "ESA"), 16 U.S.C.A. § 1531, *et seq.* (West 2000 & Supp. 2004). *See id.* § 1539 (West 2000). (App. LL.) When the FWS refused to issue an ITP, Petitioners were prohibited from harvesting timber on their property based upon Oregon Administrative Rule 629-665-0210 (2004), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a

written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat; [and]

(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. . . .

(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .

. . . .

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This rule is reproduced in its entirety as Appendix JJ ("App. JJ").

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

The ESA, 16 U.S.C.A. §§ 1531-44, prohibits the "take" of an endangered species, *id.* § 1538(a)(1)(B) (West 2000), which includes harassing, harming, pursuing, wounding, or killing such an animal, *id.* § 1532(19) (West 2000). The Environmental Protection Agency ("EPA") defines the ESA prohibition against "harming" endangered species to include "significant habitat modification or degradation where it

actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2003). The ESA also provides a permitting mechanism to allow the "incidental take" of an endangered or threatened species in certain circumstances, authorizing "any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C.A. § 1539(a)(1)(B) (West 2000).

The ESA invests the Secretary of the Department of the Interior with the authority to "determine whether any species is an endangered species or a threatened species." *Id.* § 1533(a)(1) (West 2000). Pursuant to this responsibility, the FWS, a division of the Department of the Interior, listed the northern spotted owl as a threatened species in 1990. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). (*See also* Apps. N, O, Q, and R.)

Oregon maintains a system of endangered species protection as well, which coexists and overlaps with the federal system. *See* Or. Rev. Stat. § 496.182(1) (2003). Once the Oregon Department of Forestry ("ODF") has designated a certain area as protected habitat for an endangered species, an individual may engage in otherwise prohibited activity only by securing a federal ITP from the FWS. (App. JJ.) Or. Admin. R. 629-665-0210(5).

The Seibers own a 200-acre parcel of land in Linn County, Oregon, which included merchantable timber. (App. F.) In January 1996, ODF implemented regulations to protect the northern spotted owl in accordance with the FWS's determination of their threatened status. (App. F.) ODF designated a 70-acre area in Linn County, Oregon, as a protected spotted owl nesting habitat, including 40 acres of the Seibers' 200-acre property. (App. F.)

On February 4, 1998, the Seibers submitted a "written plan" to ODF, as required by Oregon law, to log timber on the regulated 40 acres. (App. F.) *See* Or. Rev. Stat. § 527.670 (1994); Or. Admin. R. 629-665-0210(1). ODF rejected the Seibers' logging application on February 19, 1998, explaining that ODF could not make an exception to the protected status of the nesting site unless the Seibers procured a federal permit (an ITP) in accordance with the ESA. (App. F.) (*See also* Apps. GG, HH, and II.)

On November 24, 1999, the Seibers submitted an ITP application to the FWS, seeking a permit to log on their regulated 40 acres. (Apps. M and P.) The Seibers' application included a Habitat Conservation Plan ("HCP"). (Apps. M and P.) Such a plan is required to describe the likely impact of the requested "take," the applicant's plan to "minimize and mitigate such impacts," the alternative options pursued by the applicant, and the reasons those options were not ultimately chosen. 16 U.S.C.A. § 1539(a)(2)(A) (West 2000).

Notice was published in the Federal Register on February 18, 2000, notifying the public of the Seibers' ITP application and requesting written comments on the permit application and HCP by March 20, 2000. (App. X.) (*See also* Apps. K, M, S, T, U, and W.)

After the notice and comment period had run, the FWS formally rejected the Seibers' ITP application on July 6, 2000, on the ground that the application did not satisfy applicable criteria for mitigation. (Apps. J, L, and Y.) The Seibers requested reconsideration of the ITP denial on July 28, 2000. (App. Z.) Reconsideration was denied, and the Seibers appealed to the Regional Director of the FWS on September 26, 2000. (Apps. I and AA.) The Regional Director denied the appeal on November 9, 2000, explaining that "in the absence of any new information or modification of their HCP proposal, we must continue to conclude that the

mitigation and minimization measures in the Seibers' proposed HCP do not meet the permit issuance criteria for an incidental take permit under the ESA." (App. H.)

The Seibers brought suit in the Court of Federal Claims on July 26, 2001, seeking compensation from the United States for a taking, claimed to result from the FWS's permit denial. (App. G.) The complaint included four counts, with three alleging (1) that the ITP denial constituted a categorical physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) that the ITP denial constituted a per se regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and (3) that the denial constituted a taking of reasonable investment-backed expectations under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

On November 26, 2001, the government filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. The Seibers responded on January 28, 2002, with a cross-motion for summary judgment. Argument on that motion was scheduled for June 6, 2002.

On June 3, 2002, the State Supervisor for the FWS sent a letter to plaintiffs' counsel stating that as a result of a visit by FWS personnel to the Seibers' property on April 21, 2002, the agency had decided that so many trees had blown down during a storm in February 2002, because they were infected with rot root, that there was no longer sufficient timber in the 40-acre protected area to provide suitable habitat for spotted owls. (App. E.) (*See also* Apps. BB, CC, DD, EE, and FF.)

On September 4, 2002, the Court of Federal Claims entered summary judgment in favor of the government. *Seiber v. United States*, 53 Fed. Cl. 570 (2002). (App. C.) The court held that the Seibers' takings claim was not ripe, finding that the FWS's permit denial was not final under the Federal

Circuit's decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). (App. D.)

On the merits, the court concluded that the ITP denial, even if ripe, would not have constituted a taking. 53 Fed. Cl. at 575. The court held that the denial was not a physical taking under *Loretto*, concluding that this very argument had recently been rejected in *Boise Cascade*. *Id.* at 576. Neither did the permit denial constitute a per se regulatory taking under *Lucas*, because the Seibers did not meet the *Lucas*, standard requiring a loss of "'*all* economically beneficial uses'" of the land. *Id.* (emphasis in original) (quoting *Lucas*, 505 U.S. at 1019). Finding that the 40-acre regulated parcel did not constitute "a separate property interest apart from [the] other [160] acre[s] containing merchantable timber," the court held that the Seibers had not lost all economic viability in their land. *Id.* at 577. Finally, the court also applied a "whole parcel" standard in rejecting the Seibers' claim under *Penn Central*.

The Seibers appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit disagreed with the Court of Federal Claims on ripeness, holding that the November 9, 2000, action was final and that the Seibers were entitled to proceed with their temporary takings claim. (Apps. A and B.) The Federal Circuit agreed, however, with the Court of Federal Claims in its rejection of the *Loretto* physical taking and *Lucas* per se regulatory taking claims. (*Id.*)

First, the court rejected the contention that the FWS's permit denial was a physical taking because it denied the Seibers the right to exclude others (*i.e.*, the spotted owls). Relying on *Boise Cascade*, 296 F.3d 1339, the court held that a prohibition against logging in protected owl habitat did not constitute a physical taking.

Second, the court rejected the Seibers' contention that their permit denial constituted a categorical taking under the U.S.

Supreme Court's theory in *Lucas* because it denied them "*all* economically beneficial or productive use" of the 40 acres at issue.

The court rejected the Seibers' categorical takings claim under *Lucas* because the ITP denial did not deprive the Seibers of all economically viable use of the timber on the entire 200-acre parcel, as distinguished from the timber on the 40 acres designated by the government as a spotted owl nesting reserve.

Third, the Federal Circuit also employed a "whole parcel" standard in rejecting the Seibers' claim under *Penn Central* for abrogation of their reasonable investment-backed expectations.

REASONS FOR GRANTING THE PETITION

Under U.S. Supreme Court Rule 10(c), a ground for review exists when a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

A. This Case Involves an Important Constitutional Question That Should Be Resolved by This Court.

The precedent established below is the latest in a growing number of cases arising out of government regulations that require property owners to leave their land in its natural condition so that it can be occupied as wildlife habitat and, at the same time, deny the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving navigational servitude). These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983).

1. *The Law Is Unsettled Under the U.S. Supreme Court's "Whole Parcel" Taking Cases.*

In the seminal regulatory taking case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court, in an opinion written by Justice Holmes, stated:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal involved a state law that prohibited the defendant from removing pillars of coal that prevented subsidence from occurring after the main body of coal had been mined. The Court's holding that a taking had occurred was based upon three factors: first, the coal pillars were a *separate estate* in real property; second, the defendant had been denied all economic use of the coal in the support pillars; and third, under the regulation there was no "average reciprocity of advantage that has been recognized as a justification of various laws." *Id.*

The Court also rejected the argument made by Justice Brandeis in his dissent:

> If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.

Id. at 419.

The majority's recognition of the coal pillars as a separate estate is relevant here. The property at issue in this case is the merchantable timber on the 40 acres that Petitioners were prevented from harvesting. Oregon has long recognized that standing timber is a separate interest in real property. *Paullus v. Yarbrough*, 347 P.2d 620 (Or. 1959). Moreover, timber is an interest that can be "taken" separately from the land on which it stands. *Hawkins v. City of La Grande*, 843 P.2d 400, 407-08 (Or. 1992). Finally, not only timber, but

individual trees can be the subject of a wrongful taking. Or. Rev. Stat. § 105.810 (2003). (App. KK.) In *Lucas*, the Court quotes from Lord Coke: "'[F]or what is the land but the profits thereof[?]'" 505 U.S. at 1017 (brackets in original). The full sentence reads: "For what is the land but the profits thereof; thereby vesture, herbage, trees, mines, all whatsoever, parcel of that land doth pass." *See* James Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed, Taking Sides on Taking Issues: Public and Private Perspectives*, 455. The right under English law to compensation for crops taken by the sovereign dates back to the Magna Carta. *Id.* at 454.

The significance of separate estates has, however, become less clear in this Court's decisions since *Pennsylvania Coal*. The "whole parcel" concept next surfaced in *Penn Central*, 438 U.S. 104 . The case involved the protection of a historic landmark, Grand Central Terminal, by prohibiting the plaintiff from building an office tower in the airspace over the old railroad station.

In *Penn Central*, the Court stated:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 1569, 4 L Ed 2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id. at 123-24 (alterations in original).

It then stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . ."

Id. at 124 (citation omitted).

Without referring to Justice Brandeis' dissent in *Pennsylvania Coal*, the Court went on to state:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

Id. at 130-31.

In a dissent written by then Justice Rehnquist and joined by the Chief Justice and Justice Stevens, the dissenters argued that a taking had occurred, because in the past the Court had recognized only two exceptions where compensation was not required. The first was the "nuisance exception," when the regulation merely prohibited the landowner from using his property in a manner that would constitute a public or private nuisance. *Id.* at 144-46. The second is when the restriction "applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'" *Id.* at 147 (brackets in original) (quoting *Pennsylvania Coal*, 260 U.S. at 415).

In responding to the majority's adoption of the "parcel as a whole" rule, the dissenters stated:

> The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Id. at 149-50 (emphasis and brackets in original; citations omitted).

Perhaps the most significant case to apply the "whole parcel" rule was the Court's 5-4 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The facts in *Keystone* were almost identical to those in *Pennsylvania Coal*. The majority distinguished them on the basis that the legislative act in *Pennsylvania Coal* had sought to protect the private property rights of the surface land owners and that in *Keystone* the legislature was protecting the rights of the public in general against what amounted to a nuisance resulting from subsidence. In arguing against the "whole parcel" rule, the dissenters noted: "Where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest." *Id.* at 520.

In another landmark regulatory taking case, the Court established a second per se takings rule in *Lucas*, 505 U.S. 1003. After discussing the *Penn Central* balancing test and the *Loretto* per se physical occupation test, the Court announced a per se test based upon the second prong of the

standard stated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). A taking occurs when the landowner has been denied all economically beneficial or productive use of his or her property. *Id.* at 1015. In discussing what property interest should be the focus of a taking, the Court in *Lucas* stated:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law . . . .

Id. at 1016 n.7 (citations omitted).

Justice Stevens, dissenting in *Lucas*, criticized the new rule because it, together with the "whole parcel" rule, could lead to an arbitrary result, *i.e.*, because it might allow recovery to a landowner who was denied 100 percent of the use of his or her property, but deny recovery to another who was denied 95 percent use of his or her property. *Id.* at 1064.

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998), the Court again pointed out that it is state property law that defines the property interest that is the subject of the taking, and not the U.S. Constitution.

The next case relevant to a "whole parcel" analysis is *Palazzolo v. Rhode Island*, 533 US 606 (2001). *Palazzolo* is important for two reasons. First, it is important because the Court held that the "whole parcel" rule did not bar a takings claim based upon a *Penn Central* analysis although it did bar one based upon *Lucas*. *Id.* at 630. Thus the rule no longer applies under the *Penn Central* ad hoc analysis, even though the "whole parcel" rule was first enunciated in that case. The second reason *Palazzolo* is important is the following statement by the Court:

> [Plaintiff] argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L.Rev. 1165, 1992 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra*, at 1016-1017, n.7, 112 S.Ct. 2886, a sentiment echoed by some commentators, see, *e.g.*, Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L.Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here.

Id. at 631.

Finally, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court held that although the "parcel as a whole" rule barred the plaintiffs from recovering based upon a *Lucas* per se theory for a temporary taking arising out of a planning moratorium, it indicated some of the plaintiffs might have been able to recover under a *Penn Central* or *Agins* theory. *Id.* at 334.

As Professor Richard Epstein points out in his article cited in *Palazzolo*, the denominator problem involved in the "whole parcel" rule was first discussed by Professor Michelman and he rejected the rule, although Justice Stevens in *Keystone* infers Michelman's support for it. Richard Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987).

Epstein then quotes from the foregoing Michelman article:

> "Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as 'rights' to particular surface uses have come to be recognized as species of 'property' under the label of 'easement' or 'servitude,' why not say that any land consists of two 'things'—mining rights and surface rights, or foundry rights and residue—and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of those rights—which the regulation totally destroys?"

Id. (quoting Michelman, *supra*, at 1193).

Referring to the Court's statements concerning the whole parcel rule in both *Penn Central* and *Keystone*, Professor Epstein goes on to state:

> [N]o amount of precedent can render coherent a position that is not. The general principle of eminent domain law has always been, and logically must be, this: What has the state taken, and not what has the owner retained.

Id. at 17.

The record in this case provides a sound foundation upon which the Court can clarify the law. The fact that the government left other timber undisturbed completely ignores the loss to the Seibers in not being able to harvest the 40 acres. The value of that timber was largely destroyed due to trees being blown down because of root rot which developed while Petitioners were prohibited from logging. (App. E.)

2. *Under a Physical Taking Theory, the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control over It.*

Petitioners' tree farm is located about six miles southeast of the town of Sweet Home, Oregon. It was in another case involving that very community and spotted owls, but in which a "taking" of the species rather than property was the issue, that Justice Scalia prophetically wrote: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Ch. of Communities for a Great Or.*, 515 U.S. 687, 714 (1995).

This Court in *Tahoe-Sierra*, 535 U.S. 302, clearly stated the difference between a physical taking and a regulatory taking. A physical taking (1) involves the government's use of the property for a public purpose and (2) denies landowners the right to exclude others from their property. *Id.* at 324 n.19. "A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.*

In this case, the government, by its regulation, has both claimed the right to use Petitioners' property for spotted owl nesting habitat and prevented Petitioners from taking any action to exclude the owls by harvesting their habitat.

Thus, in *Boise Cascade* and here, the Federal Circuit shifted the focus of this Court's physical taking jurisprudence from the issue of whether there had been a forced occupation authorized by government to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23 (1992).

In a physical taking case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases arising out of government requiring private landowners to subordinate the use of their property to a dominant use of it by the government to protect wildlife. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (government does not "control the conduct" of wildlife species), *cert. denied*, 490 U.S. 1114 (1989) (see dissenting opinion of Justice White); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. Dist. Ct. App.) (landowner can use its property "in any way that would not disturb the eagles' natural habitat"),[1] *rev. denied*, 645 So. 2d 452 (Fla. 1994).

Here, the subject regulation goes beyond merely regulating the use of Petitioners' land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat. Clearly, it is a use of private property by the government for a public purpose. *Yee*, 503 U.S. at 522-23. And most importantly, Petitioners cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years. Petitioners

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[1] *See* William K. Jones's (Charles Evans Hughes Professor of Law at Columbia University) criticism of the *Flotilla* decision, describing it as a "classic" example of a physical taking. *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 61-62 (1995).

have no choice under the subject regulation but to acquiesce to the occupation of their timber as a nesting site. *Id.* at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)).

The subject regulation not only imposes a wildlife servitude upon Petitioners' timber, but it also singles them out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe-Sierra*, 535 U.S. at 340-41. The subject regulation does not require that all owners of commercial timberlands set aside timber to provide nesting habitat for spotted owls; it is directed only at those who happen to have an existing nesting site on their property or within the 70-acre protected area.

As one scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reprocity of advantage, the ESA burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

By failing to provide compensation to those owners who do have spotted owl nesting habitat, the government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render their timber without any commercial value. The government's short-sighted policy

serves neither the best interest of the owls, nor that of those citizens whose timber is appropriated for owl habitat.

As Justice Holmes stated in *Pennsylvania Coal*, 260 U.S. at 416: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The U.S. Supreme Court's regulatory taking analysis has been described as a "muddle," and a whole forest has been consumed by the law reviews written about it. *See* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 Wm. & Mary L. Rev. 825 (1997); Steven Ward, *Lucas v. South Carolina Coastal Council: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. Rev. 165 (1992).

The U.S. Supreme Court now has a *Penn Central* "ad hoc" analysis to which it originally applied the "whole parcel" rule, but the rule no longer applies in cases involving that standard. *Palazzolo*, 533 U.S. at 630. Nor does the "whole parcel" rule apply to regulatory takings involving a physical occupation per se analysis. *Loretto*, 458 U.S. at 434-35. The "whole parcel" rule does not apply to a *Lucas* per se analysis, but then the question becomes: to what property interest does the rule apply? 505 U.S. at 1016 n.7. And the Court has recently raised the issue of whether it should apply at all. *Palazzolo*, 533 U.S. at 631.

Then there is an *Agins* analysis involving whether the regulation substantially advances a legitimate government

interest, and again the "whole parcel" rule is irrelevant under that standard. *Tahoe-Sierra*, 535 U.S. at 334. Nor does it apply under an *Eastern Enterprises* analysis in which the government singles out a property owner to bear the burden of providing a remedy for a social problem that the owner did not create.

The confusion has become so great that in the recent *Tahoe-Sierra* case the Court felt it necessary to review at length its regulatory takings jurisprudence. In doing so, it pointed out that it had stated different rules to govern regulatory takings involving physical occupations and those that do not, and that the precedents for one type should not be used in cases involving the other. *Id.* at 323. The Court then stated a bright-line test for distinguishing physical takings from other regulatory takings. *Id.* at 324 n.19.

The confusion only becomes greater when a temporary taking is involved. When a temporary taking involves a planning moratorium, a *Lucas* per se analysis is not appropriate. *Id.* at 331-32. However, a *Lucas* analysis is applicable if the original taking was permanent and the government later rescinds its restriction. *Lucas*, 505 U.S. at 1030 n.17; *Seiber v. United States*, 364 F.3d 1356, 1364-65 (Fed. Cir. 2004). But even in moratorium cases the plaintiffs may be able to proceed on a *Penn Central* or *Agins* theory. *Tahoe-Sierra*, 535 U.S. at 334.

As for physical takings, this Court recently stated a physical taking is "typically obvious and undisputed" and should be "easily identified." *Id.* at 322 n.17, 324. While physical appropriations of private property for a public purpose may be obvious to landowners, they are not always easily identified by the lower courts and all too often they are disputed by the government through a long and expensive litigation process. *Id.* at 322 n.17; *e.g., Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001); *Boise Cascade Corp. v. Or. State Bd. of Forestry*, 991

P.2d 563, 570 (Or. Ct. App. 1999); *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990), *appeal after remand*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687, 698 (1999) (which, although tried as regulatory taking claim, in part involved habitat for endangered Smith's Blue Butterfly). By arguing that such cases should be analyzed as a regulatory taking rather than as a physical taking, the government stands a much better chance of avoiding liability for having made use of a landowner's property for a public purpose.

The government's argument for a regulatory analysis is that its need to protect threatened or endangered wildlife habitat trumps almost any limitation imposed on the owner's productive use of the property. *Tulare Lake*, 49 Fed. Cl. at 318-19. From the government's standpoint, the property owner's investment-backed expectations, compared to the need to protect endangered or threatened wildlife, are irrelevant. To many in government, the protection of such wildlife, like the protection of historic sites, must be protected at all costs; however, because those costs may be more than most taxpayers are willing to bear, it is often the government's position (supported by some in the academic community) that the costs should be borne by the landowner and not the public.[2] *Id.*; *see Penn Central*, 438 U.S. at 138-42 (Rehnquist, J., dissenting).

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[2] In support of this view, a number of academics argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of*

Courts are well aware of the impact takings cases can have on the public treasury and have not been hesitant to seek ways to avoid this Court's takings jurisprudence. See Justices Scalia and O'Connor dissenting from a denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); and *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994). Here, Petitioners' timber has been appropriated for a public purpose, which brings the facts of this case squarely within the definition of a physical taking. *Tahoe-Sierra*, 535 U.S. at 322.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Dated this 16th day of July, 2004.

Respectfully submitted,

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Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995).